another, and who of necessity must lack in some measure a full appreciation of that other's point of view.

No one is always right, but it is quite certain that the author would not have fallen into such an error as have the editors in their discussion of what they are pleased to call the "pseudo-presumption of good character." They say: "It is a familiar rule of procedure, elsewhere considered, that unless, or until, the accused in a criminal case shall open the issue of character, no inference shall be drawn that he did the act in question because he had the traits of character which would permit or predispose him to do it." (§ 476.) The logical inference from such a statement is, that when the defendant has introduced evidence of his claimed good character, then the state may give evidence of his claimed bad character *as a basis for the inference* "that he did the act in question because he had traits of character which would permit or predispose him to do it." No principle is better settled in the law of evidence than that such use cannot, save in one or two quite exceptional cases, be made of the evidence of bad character. One might look for this error to be corrected in the more general discussion of the evidentiary use of character in the subsequent section referred to, (§ 1029), but the correction is not found, the error, on the contrary is perpetuated.

But these illustrations are not typical of *many* errors in either the exercise of judgment in the abridging process, or in the statement of the law. They are rather illustrative of *some* errors more likely to appear where the abridging process is worked out by a stranger. It is seldom true that the literary forms of two authors run well together, and they are certain to differ much in their measures of substantive values.

It would be difficult to speak too extravagently of the work abridged, and the abridgment will be welcomed by the profession as a useful book, notwithstanding it enters a field far from barren before it appeared.

The book is printed on thin paper in large type and with flexible cover, too large for the pocket but convenient to handle. V. H. LANE.

THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW. A Contribution to the History and Theory of Juristic Persons in Anglo-American Law. By Gerard Carl Henderson, A.B., LL.B. Harvard Studies in Jurisprudence, II. Cambridge, University Press. London: Humphrey Milford, Oxford University Press; 1918. pp. xix, 199.

This is an illuminating and discriminating discussion and criticism of the American decisions,—mostly Federal,—upon many of the perplexing problems arising under the United States Constitution, when a corporation of one state claims rights in another state.

The constitutional provisions involved are: "Congress shall have power to regulate commerce among the several states" (Art. I, § 8, cl. 3); "The judicial power shall extend to controversies between citizens of different states" (Art. III, § 2); "The citizens of each state shall be entitled to all

the privileges and immunities of citizens in the several states" (Art. IV, § 2); "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (Amend. XIV, §1.)

In the *Introduction* the author calls attention to two theories as to the nature of a corporation,—as a highly privileged body with quasi-governmental powers such as the East India Co., or the Virginia Co., of 1600 and 1607; or only as a convenient mechanism for carrying on business and trade by a group of persons.

In Chapter II,—*Beginnings of American Law,* there is sketched the change from the old view, of special grants and privileges by King's Charter or special legislative act to the modern practice of freedom of incorporation under general laws.

The real discussion begins in Chapter III, *The Rule of Comity,* and starts out with Marshall's and Taney's views of the nature of a corporation as a person and citizen . These questions arose as to the right of a corporation to sue in the federal courts, and the right to do business away from home. In 1809, *Bank of U. S.* v. *Deveaux,* 5 Cr. 61, MARSHALL, C. J. said a corporation is an artificial being and cannot be a *citizen;* only its members can be such; but if there is the requisite diversity between them and the other party, they may sue in the federal courts in the corporate name. In 1839, when the question was as to the right of a corporation of one state to do business in another, Webster argued, that if *citizens* of Pennsylvania can sue in their corporate name in Alabama, they have the same right under the privileges and immunities clause to trade there in that name. TANEY, C. J. in *Bank of Augusta* v. *Earle,* 13 Pet. 519, said, No. The corporation is an artificial person; it has no legal existence outside the creating state; it must dwell there and cannot migrate; its existence at home may be recognized abroad; but this is a matter of comity in another state, and not a matter of right; it may be represented by agents abroad, who may contract for it there; but such contracts are *its* contracts, not those of its members individually, otherwise they would be individually liable on them, as partners.

These decisions left the citizenship question in a very unsatisfactory shape, and the last one raised numerous questions as to suits against foreign corporations.

In Chapter IV, the author treats of *The Citizenship of Corporations.* Five years after the *Earle* case, the court in *Railway Co.* v. *Letson* (1844), 2 How. 497, declared a corporation may be treated as a citizen of the creating state, for the purpose of suit in the federal courts, as much as a natural person. But in 1853 after Mr. Justice DANIEL in a dissenting opinion, pointed out if that was true we might have a corporation member of the legislature, or president, or commander of the army or navy, the court got frightened at its boldness in the *Letson* case, executed a double somersault in *Marshall* v. *B. & O. Ry.* (1853) 16 How. 314, holding a corporation, for federal jurisdiction, is not and cannot be a citizen; only its members can be such; but they are conclusively presumed to be citizens of the creating state, although all of

them live elsewhere. This of course, landed the court in immediate confusion when the suit is between the corporation and one of its members living outside the creating state, or when there has been a consolidation of two or more corporations created by different states. The author reviews these cases, and the unsatisfactory conclusions reached.

In 1868, *Paul* v. *Virginia,* 8 Wall. 168, after the *Letson* case, Webster's argument that a corporation was a citizen within the privileges and immunities clause was pushed with vigor, but the court, going back to the doctrine that "a grant of corporate existence is a grant of special privileges," held, contrary to the interpretation of similar words in treaties and international relations generally, that the constitutional provision applied only to such privileges and immunities "as are common to citizens under their laws and constitutions by virtue of their being citizens,"—otherwise no state could limit the number of corporations doing business within its borders, for if it created a single corporation for any purpose, it would open the door for a flood of such from other states. This, however, left open a big question, when general laws gave a common right to all citizens to incorporate.

If, as Chief Justice TANEY said, a corporation exists only at home, and cannot migrate, how and where can it be sued, and served with summons? The author treats of this in Chapter V, *Jurisdiction of the Courts over Foreign Corporations,* and shows that there had been, in the state courts, two theories: one, when a corporation of state A establishes a place of business in state B, and does business there, it is actually there, and can be sued and served with summons there; the other, that while the corporation is not there, it impliedly consents to be subject to the laws of state B, and can be sued and served with summons there if the laws of B so provide. This latter view was taken by the supreme court in *La Fayette Insurance* v. *French* (1855) 18 How. 404; but the corporation must be doing business in the state, and the agent must be really representative to constitute due process. *St. Clair* v. *Cox* (1882) 106 U. S. 50. This consent, however, is peculiar: since the corporation has no existence outside the creating state, and since jurisdiction cannot be conferred on the federal courts, either by consent of the parties, or by state legislation,—yet if the legislature requires a corporation to consent to be *found* within the state as the condition of doing business there, then if it does business there, the courts, by a fiction can find it within the state although from its very nature it cannot be there. *Ex Parte Schollenberger* (1877) 96 U. S. 369. But in *Barrow Steamship Co.* v. *Kane* (1908), after the court had again held that a corporation can be an inhabitant and resident of the creating state only, it was ruled that a British corporation could be sued in the federal court in New York, by a citizen of New Jersey.

The Power to Exclude Foreign Corporations, is the title of Chapter VI, and discusses C. J. TANEY'S theory that a corporation does business in a foreign state only by the comity of that state, which can be withdrawn at any time. This was affirmed by *Paul* v. *Virginia,* and after holding in 1870, that a foreign corporation, even though it had agreed not to do so, could as its constitutional right remove a suit against it into the federal court, but for

so doing the state could revoke its license and expel it from the state. *Doyle* v. *Insurance Co.* (1876) 94 U. S. 535.

Chapter VII, treats of *Foreign Corporations* and the Commerce Clause. *Paul* v. *Virginia* held that insurance was not commerce, and this is still the doctrine of the court. *New York Life Ins. Co.* v. *Deer Lodge &c.* (1913) 231 U. S. 493. In 1877, it was ruled that the states could not exclude a corporation with authority from the United States to engage in interstate commerce from doing so. *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S. 1. It follows that a state could not tax the right to engage in interstate commerce, *Glouchester Ferry Co.* v. *Penn.* (1884), 114 U. S. 196, although it could tax by a non-discriminating property tax the fairly valued proportion in the state of all its property tangible and intangible. *Adams Express Co.* v. *Ohio* (1897) 165 U. S. 194; but a foreign telegraph company doing interstate and local business cannot be required to pay a license fee on all its capital stock for the privilege of doing a local business. *Western Union Tel. Co.* v. *Kansas* (1910) 216 U. S. 1., contrary to what had been held in 1888, and 1892, as to mining companies, *Horn* v. *Silver Mining Co.* (1892) 143 U. S. 305.

The author then in Chapter VIII goes back to *The Doctrine of Unconstitutional Conditions,* such as the right of a state to exclude an insurance company from doing business in the state after it violated its promise not to remove a suit against it to the federal case as in the *Doyle* case above. Eleven years after this was decided it seemed to be overruled by *Barron* v. *Burnside* (1887) 121 U. S., 186, holding an insurance agent could not be punished criminally for doing business in the state for an insurance company that had failed *to agree* not to remove suits into the federal courts, since such an agreement would be void, and could not be made the basis of a criminal prosecution. Then in 1906 the court again held that an insurance company's license could be revoked *if it did remove* suits to the federal courts contrary to its agreement, *Security Mut. Ins. Co.* v. *Previtt,* 202 U. S. 426; but in 1916 this could not be done to a corporation engaged in interstate commerce. *Donald* v. *Philadelphia &c. Co.,* 241 U. S. 329. Also in 1910 there was a series of cases, such as *Pullman Co.* v. *Kansas* 216 U. S. 56, holding that a state could not impose a tax on the property of such a company, both in and out of the state, for the privilege of doing local business.

After the court had held that a corporation was not a citizen protected under the privileges and immunities clause, corporations turned to the theory that they were *persons,* under the *due process* and *equal protection* clauses of the XIV Amendment. The author discusses this matter in Chapter IX, *Foreign Corporations and the Fourteenth Amendment.* It was at once conceded that corporations were persons under the *due process* clause, and there has been no dispute on this proposition. But if C. J. TANEY's view that a corporation dwelt only in the state of its creation, and could not migrate, how could it be said to be within the jurisdiction of another state and be entitled to the equal protection of the laws there? In 1898, it was held that in order to be so protected it must be within the jurisdiction of the State. *Blake* v. *McClung* 172 U. S. 239. How can it be? No very satisfactory

answer has yet been given by the court. If it is engaged in interstate commerce, has entered the state by its consent and acquired property of a permanent kind, which cannot be easily disposed of, and which it uses in interstate commerce, it then is sufficiently within the State to be exempt from a tax for doing local business that is not imposed on domestic corporations of the same kind. *Southern R. R. Co.* v. *Greene* (1910) 216 U. S. 400. This, however does not prevent a state from taxing its own corporations (which are undoubtedly within its jurisdiction) but doing a large business outside the state on all of its capital stock, even if foreign corporations doing business in the state can be taxed only in such proportion of its capital stock as is represented by the business in the state. *Memphis &c. R. R. Co.* v. *Stiles* (1916) 242 U. S. 111. This looks like a discrimination against its own corporations.

Chapter X, is a *Critical Re-examination,* of the theories as to the nature of a corporation involved in the above very imperfectly outlined course of decisions. The author examines with care in the foregoing chapters a large number, about 300, of relevant cases, and points out what difficulty the courts have had in fitting their theories of corporations to the very complex situations that arise. He, on the whole, perhaps favors the recognition of the corporation as a *citizen* having *civil capacity,* for suits by and against it, and to a much larger extent as a *citizen* under the privilege and immunities clause, as to their functional capacity, under general incorporation laws of substantially the same character. It is doubtful whether the courts will come to this latter policy. However this would be much nearer the Continental theories set forth so admirably in *Young's Foreign Companies and other Corporations.* The decisions upon these matters are in a constant flux, and it is impossible to predict what the court will do in reference to many of the questions involved. Since this book was prepared, the court has recently handed down several decisions, some of which probably modify the decisions reviewed by the author. See *Looney* v. *Crane Co.* (1917) 245 U. S. 178, 38 S. Ct. 85; *International Paper Co.* v. *Massachusetts* (1918) 246 U. S. 135, 38 S. Ct. 292; *Cheney Brothers* v. *Massachusetts,* (1918) 246 U. S. 147, 38 S. Ct. 295; *Cudahy Packong Co.* v. *Minnesota* (1918), 246 U. S. 450, 38 S. Ct. 373; *Northwestern Mutual Life Ins. Co.* v. *State* (1918) 247 U. S. 132, 38 S. Ct. 444; *Peck & Co.* v. *Lowe* (1918) 247 U. S. 165, 38 S. Ct. 432; *Union Pac. R. R. Co.* v. *Public Service Comm.* (1918) 39 S. Ct. 24; *Wells Fargo & Co.* v. *State* (1918) 39 S. Ct. 48.

If *Natura non it per saltum,* indicates that there is any such thing as natural law, then it would seem from the foregoing, as we may suspect from Mr. Justice HOLMES article 32 Harv. L. Rev. 40, that it does not have much place in the decisions of the supreme court, for the evolutions not to say gyrations, disclosed by them show it proceeds quite frequently *per saltum.*

The author has produced a valuable book. It is dedicated to Mr. Justice BRANDEIS.

H. L. WILGUS.